IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 702

ALLEN E. NILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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March 27, 1956.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner files this brief in reply to the brief for the United States in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

The United States opposes the grant of certiorari in this case on the sole ground that petitioner's general sentence of a year and a day in prison may be sustained on the basis of specification No. 3 alone, the specification which charged him with having willfully

disobeyed a subpoena and the order of the court for the production of certain records of the Mayflower Company (Brief, p. 11). It is said that the petitioner's principal contentions relate to the proof on specification No. 1 that he gave false and evasive testimony and that those contentions need not be reached in view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3. The United States makes no attempt to sustain the conviction by reference to the proof or procedure as to specification No. 2 (see Brief, p. 17, fn. 7).[1]

But the effort to sustain the conviction by reference to specification No. 3 alone is completely misplaced. The United States relies in this respect upon the doctrine that a general verdict or judgment in a criminal case on an indictment containing several counts cannot be reversed if any one of the counts is good and warrants the sentence imposed. *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States,* 320 U.S. 81, 85. But the reason for this rule, as explained by this Court in *Claasen* v. *United States,* 142 U.S. 140, 146-147, and referred to in the *Pinkerton* case, is that "in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." Or, as stated by this Court in *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 440,

> The rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that

[1] The United States admits that there was no proof that the particular records referred to in specification No. 2 were actually in existence at the time the subpoena was served.

> the judge ignored the finding of the jury on the bad counts, and sentenced only on those which were sufficient to sustain the conviction.

In the instant case, however, there is no warrant in the record for the presumption that the sentence was awarded on specification No. 3 only. The trial judge specifically found petitioner "guilty of criminal contempt as set forth in the Order to Show Cause *insofar as the three specifications therein are concerned,* and it specifically finds that the acts of the defendant [petitioner] which constitute criminal contempt did obstruct the administration of justice" (R. 67, emphasis added). The sentence of imprisonment for a year and a day was thereupon imposed without reference to or without being broken down as to any particular specification (R. 67). And in the formal judgment and commitment (R. 67), the trial court found that petitioner gave false and evasive testimony as specified in specification No. 1, that he disobeyed subpoena duces tecum No. 78 as specified in specification No. 2, and that he disobeyed subpoena duces tecum No. 160 as specified in specification No. 3. The formal order thereupon reads:

> WHEREFORE, it is adjudged that Allen I. Nilva is guilty of criminal contempt of the authority of this Court; and it is
>
> ORDERED that Allen I. Nilva is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of One (1) year and One (1) day; . . .

Obviously, then, there is no room here for the presumption that the sentence of a year and a day was imposed solely on the basis of the third specification

or that the first two specifications were ignored by the trial judge in imposing the sentence. The case here is precisely like the situation in the *Gompers* case, where this Court said (221 U.S. at 440):

> But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts, he consolidated the sentence without indicating how such of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that, having found them guilty of these nine specific acts, he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

See also *Stromberg* v. *California,* 283 U.S. 359, 368; *Williams* v. *North Carolina,* 317 U.S. 287, 291-292.

In other words, if the sufficiency of the proof or the propriety of the procedure as to any one of the three specifications in this case is legally suspect, the conviction cannot stand. It cannot be said that the general sentence of a year and a day was unaffected by the first two specifications. But for the finding of guilt as to either of the first two specifications, the sentence imposed might have been less severe.

Thus it is that the patent failure of the trial court to insist upon the full due process requirements of Rule 42(b) cannot be ignored.[2] It is an error which the United States virtually concedes (Brief, pp. 15-16) in remarking that "there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney of record at the Christianson retrial, since he presumably would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated." It is an error which is magnified by the direct conflict existing between the decision below and that of the Court of Appeals for the Fifth Circuit in *Matusow* v. *United States*, decided January 27, 1956, a conflict which the United States makes no attempt to deny. Clearly, the basis for the exercise of this Court's jurisdiction by way of certiorari is present in this case.

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[2] At page 15 of its Brief, the United States contends that petitioner had been given access to all the impounded Mayflower records before the contempt hearing and that he therefore had an opportunity to check Peterson's testimony with these records and to call him as a witness at the contempt hearing. But the court's order giving petitioner access to these records was made just before a recess in the contempt hearing, a recess which permitted but two or three hours to examine these voluminous records (R. 35). Moreover, at this point the Government had not sought to introduce the transcript of Peterson's testimony. Petitioner thus had no way of knowing that Peterson's testimony would be relevant or that it would be important to check the records against his testimony.

For the foregoing reasons and for the reasons set forth in the petition for a writ of certiorari, it is appropriate for a writ of certiorari to issue in this case.

Respectfully submitted,

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